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No. 00-862

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JANET RENO, et al.,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The District Of Columbia

MOTION OF NON-FEDERAL APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

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MOTION OF NON-FEDERAL APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT

Pursuant to Rule 18.6 of the Rules of this Court the non-federal appellees (the Virginia NAACP Intervenors, the Smith Intervenors, the Marsh Intervenors, and the City of Los Angeles *et al.* Intervenors – collectively, the "Intervenors"), who are defendant-intervenors in this case before the United States District Court for the District of Columbia, move to dismiss this appeal or, in the alternative, to affirm the judgment of the District Court dismissing without prejudice Counts I, II, III and IV of the complaint of the plaintiff-appellant, the Commonwealth of Virginia ("Virginia"). In support of this motion the Intervenors submit the following argument.

ARGUMENT

Virginia's Jurisdictional Statement sets forth, albeit in very self-serving terms, the background of this case. What is most significant to this motion, and to this appeal, is the final paragraph of Virginia's Statement of the Case, wherein Virginia notes that the District Court dismissed its claims as not ripe for judicial consideration at this time because the Census Bureau has not yet committed to releasing redistricting data that has been corrected by statistical sampling.[1] (Jurisdictional Statement ["J.S."] Appendix ["App."] 12). Given that decision below, the Intervenors respectfully submit that the only Question Presented by this appeal is the first of the four questions set

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[1] Virginia uses the term "adjusted" to refer to this census data. The Census Bureau refers to the census data in question as "statistically corrected," rather than "statistically adjusted," to reflect the fact that "the statistically corrected data will be more accurate," (J.S. App. 64), so the term "corrected" will be used herein.

forth in Virginia's Jurisdictional Statement – the question whether the District Court erred in dismissing as unripe Virginia's request for a declaratory judgment that Chapter 884 of the 2000 Va. Acts of Assembly ("Chapter 884") (1) is not covered by Section 5 of the Voting Rights Act or (2) if covered, does not have a retrogressive purpose or effect.

I. Virginia's Appeal Raises No Substantial Federal Question.

As noted above and discussed more fully below, the only question presented by Virginia's appeal is whether the District Court correctly ruled that Virginia's request, for a declaratory judgment that Chapter 884 does not run afoul of Section 5 of the Voting Rights Act, is not ripe for judicial consideration. None of the other issues raised by Virginia, as set forth in the last three of its Questions Presented, was considered by the District Court.

An appeal that presents only the question of ripeness regarding a claim concerning a single statute of a single state patently does not raise a substantial federal question for consideration by this Court. Virginia attempts to argue a wider scope for its appeal by suggesting that Alaska, Arizona, and Kansas have enacted legislation similar to Chapter 884. It is noteworthy, however, that neither Alaska nor Arizona has as yet filed an action seeking the relief that Virginia seeks here, and Kansas is not even covered by Section 5 of the Voting Rights Act. Thus, it is only the ripeness of Virginia's claim with respect to its Chapter 884 that is at issue here. That does not raise a substantial federal question.

Virginia's appeal also does not raise a substantial federal question because, by the admission of its own counsel in oral argument before the District Court, even a favorable decision on the limited claims under Section 5 of the Voting Rights Act that are the subject of this appeal

would give Virginia only a "hollow victory." Such a victory would be "hollow" because it would still not preclude the Department of Justice from using data other than uncorrected census data in reviewing Virginia's new redistricting plan. (Hearing transcript, September 11, 2000, p. 43.)[2]

Virginia initially addressed this issue by including in Count II of its Amended Complaint a request that the Department of Justice be precluded from relying on corrected population counts in its review of redistricting plans submitted pursuant to Section 5. The District Court held that that claim, like those in Counts I, III, and IV of Virginia's Amended Complaint, was not ripe, but Virginia has not appealed the dismissal of Count II. Thus, by its own admission, it seeks on this appeal what would, at best, be a "hollow victory" that would not resolve its ultimate concern – that the Justice Department be required to use only the uncorrected census data in reviewing Virginia's redistricting plan for the preclearance it requires under the Voting Rights Act.

Thus not only is Virginia seeking an advisory opinion from this Court, but it is an advisory opinion that would constitute only a "hollow victory" for the plaintiff. This Court's jurisprudence cautions that constitutional issues should be reached only when required. *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). Further, in this lawsuit's present posture, any decision on

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[2] Virginia will have to submit any redistricting plan for congressional or legislative districts for preclearance even if it obtains preclearance of Chapter 884. In addition to the policy change embodied in Chapter 884, a redistricting plan will contain new districts that will be a "standard, practice, or procedure with respect to voting different from that [previously] in force or effect," Voting Rights Act of 1965, Section 5, 42 U.S.C. § 1973c.

the constitutional or Census Act claims would be purely advisory, and, thereby, impermissible. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 88-89 (1947). Under these circumstances, Virginia's request not only does not raise a substantial federal question but is inappropriate for adjudication by this Court, and Virginia's appeal should be dismissed.

II. The District Court Correctly Held That Virginia's Claims Are Not Ripe For Judicial Consideration At This Time.

A. Virginia's Request for Declaratory Judgment under Section 5 of the Voting Rights Act is Not Ripe for Review, Because the Census Bureau Has Not Yet Made a Final Decision To Release Statistically Corrected Census Data.

Virginia seeks preclearance under Section 5 of the Voting Rights Act of Chapter 884, which prevents Virginia and its political subdivisions from using statistically corrected census data for redistricting for state officials. Under Section 5, Virginia has the burden of proving that the submitted voting changes will not have a retrogressive racially discriminatory effect and that they were not adopted with a discriminatory intent to retrogress. As this Court has held,

> [a] covered jurisdiction . . . must make two distinct showings: first, that the proposed change 'does not have the purpose . . . of denying or abridging the right to vote on account of race or color,' and second, that the proposed change 'will not have the effect of denying or abridging the right to vote on account of race or color.'

Reno v. Bossier Parish School Bd., 120 S. Ct. 866, 871-872 (2000) (citations omitted).

Consideration of these issues, however, may be undertaken only if the claims are ripe for review. *Texas v. United States*, 523 U.S. 296 (1998). Whether or not Virginia's ban on the use of statistically corrected census data will have a retrogressive effect cannot be determined until the time, if ever, when the corrected census data are released. Therefore, Virginia's preclearance claims are not yet ripe for review.

This Court has held that in a Section 5 declaratory judgment action, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). Moreover, this Court has reasoned that in considering whether an issue is ripe for judicial consideration, it must "'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Texas*, 523 U.S. at 301 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

Virginia's claim that Chapter 884 will not have a retrogressive effect is contingent ultimately upon the type or types of data issued by the Census Bureau and how significantly those data reflect an undercount of the minority population of the state of Virginia. As the District Court observed, "the court would have to decide if the difference between actual and adjusted figures is of significance, and whether redistricting using actual figures could be considered a 'retrogression in the position of minorities with respect to [voting].'" (J.S. App. at 11.) Currently under Virginia law, the local jurisdictions in the state have the discretion to choose what data, either

corrected or uncorrected, they use in redistricting. Under Chapter 884, that discretion is eliminated, and Virginia and its local jurisdictions would be required to use one type of census data only – uncorrected data. However, whether this limitation on the choice of data will have a retrogressive effect depends on a set of decisions not yet made.

The Census Bureau has not made a final determination on whether to release the corrected data and will not make this decision until "after it evaluates the quality and accuracy of the [data collection] process." (*Id.* at 12.)[3] As the District Court correctly found, analysis of the potential retrogressive effect of Chapter 884 "need only be conducted if and when the Census Bureau releases adjusted figures. If the Census Bureau does not release adjusted data, Chapter 884 will have no practical effect, and this court would not need to grapple with the issue of whether to define retrogression in terms of adjusted figures." (*Id.* at 11-12.) Therefore, Virginia's Section 5 claim is completely contingent upon "'future events that may or may not occur as anticipated, or indeed may not occur at all,'" *Texas*, 523 U.S. at 300 (citations omitted), and is a "textbook example of a claim that is not ripe for adjudication." (J.S. App. at 12.) *See also Texas*, 523 U.S. at 300 ("Under these circumstances, where 'we have no idea whether or when such [a sanction] will be ordered,' the issue is not fit for adjudication") (citation omitted).

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[3] This is consistent with past practices. Indeed, the determination extends beyond the Census Bureau. It is the Secretary of Commerce who has the final authority to determine what census data are released. In 1987, the Under Secretary of Commerce informed the Census Director that corrected data would not be released. *City of New York v. Dept. of Commerce*, 822 F.Supp. 906, 914 (E.D.N.Y. 1993). In 1991, the Secretary of Commerce went on television to announce his decision not to correct the census data, and issued a 178 page report giving the reasons for his decision. *Id.* at 917. In short, nothing about the use of corrected data is certain.

As the District Court correctly found, even if the Census Bureau's decision as to what data to use were more certain, Virginia would suffer little, if any, hardship if a Section 5 determination is withheld or delayed to a future date when the contingent events described above may occur and sufficient facts can be developed to make a proper determination. Virginia's failure to obtain a judgment at this point will not prevent the state or local governments from performing redistricting in 2001 using whatever data they prefer. (J.S. App. at 13-14.) Postponing adjudication on this issue will thus not delay Virginia's redistricting or election processes and therefore will cause no harm.

Furthermore, Virginia has enacted Chapter 886, which authorizes the State Board of Election to reschedule the statewide primary election of June 12, 2001 and relax candidate qualifying and other deadlines for state and county elections if redistricting has not been completed and preclearance under Section 5 has not been obtained. (J.S. App. at 13.) Virginia clearly anticipated and prepared for any potential delay in implementation of Chapter 884, and it cannot now maintain that it will be harmed by waiting until the matter is ripe for consideration.

B. Even If It Were Now Certain That the Census Bureau Will Release Statistically Corrected Census Data, Virginia's Claim Would Not Be Ripe.

As noted above, Virginia has the burden of proof to show that the use for redistricting of corrected census data rather than uncorrected data will cause it real harm. In the absence of a demonstration of such harm, Virginia's need is purely hypothetical. To demonstrate that it has standing to raise its claim, Virginia must show that the relief it seeks will make a real difference in its situation. It must show "that there is a 'substantial likelihood' that the relief requested will redress the injury claimed...." *Duke Power*

Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75 n. 20 (1978) (citations omitted).

In the absence of the census data – both raw and corrected – it is impossible at this time to predict the differences between the two sets of census data. Even if the two population counts are significantly different, the differences may vary from block to block, but the positive or negative variations in an aggregation of blocks may cancel each other out. This is because of the well-known mathematical principle that aggregation tends to hide or smooth variations in the constituent elements. Until we have Virginia's actual census data to analyze – and, more importantly, until Virginia draws districts made up of hundreds of blocks each – we will not know if there is an actual difference between using the corrected and using the uncorrected data.

C. Virginia's Failure To Appeal the Dismissal of Count II Confirms That Its Claim Is Not Ripe.

As noted above, in Count II of its Amended Complaint Virginia asked that the Justice Department be precluded from relying on anything other than uncorrected census data in its Section 5 review of Virginia's redistricting plan. Its counsel noted in his argument to the District Court that even a favorable decision on Virginia's Voting Rights Act claims under Counts I, III, and IV would be a "hollow victory" unless the Justice Department were told, as requested in Count II, that it must compare "apples to apples" – prior uncorrected census data to the most recent uncorrected census data – in reviewing Virginia's redistricting plan. The District Court held that that the Count II claim, like the Voting Rights Act claims in Counts I, III, and IV, was not ripe for adjudication, and Virginia has not appealed that part of the judgment below. It has thus accepted that its claim in Count II is not ripe.

However, that admittedly unripe claim is so closely tied to Virginia's other claims that, as its counsel acknowledged, even a favorable decision on those claims would be a "hollow victory" without a favorable decision on Count II. (Hearing transcript, September 11, 2000, p. 43.) Thus, since Count II is not ripe for decision, the closely related claims that are on appeal are also not ripe for decision.

III. The Merits Of Virginia's Claim Are Not Properly Before This Court.

As Virginia's reversal of direction with regard to its Count II below reveals, this is a case of a litigant seeking rulings to help in future legal disputes with the Department of Justice, rulings that may never need actually be reached. The lack of substantiality in the contentions reveals a classic example of why federal courts do not reach out to decide issues unnecessarily, particularly those of constitutional interpretation.

Virginia devotes three of its four Questions Presented, and the bulk of its argument in its Jurisdictional Statement, as set forth in its Point III, to the merits of its claim that Chapter 884 does not run afoul of Section 5 of the Voting Rights Act. However, the only question that is properly presented by this appeal is whether the District Court erred in holding that Virginia's claim on that point is not now ripe for judicial consideration. The merits of that claim are not properly before this Court. The District Court did not reach those merits, as it dismissed Virginia's claims on the sole ground that they are not ripe for judicial review. (J.S. App. 16.) That dismissal came prior to any pre-trial discovery or any factual hearing in the case, so there is no factual record whatsoever before this Court. Thus, if, contrary to the Intervenors' position, this Court were to accept jurisdiction of Virginia's appeal, the only matter before this Court for consideration on this appeal would be whether the District Court correctly held that Virginia's

claims are not ripe for judicial consideration. Under the well-established practice of this Court, matters that were not addressed by the court below are not considered on appeal here. *E.g., Brandon v. Holt*, 469 U.S. 464, 473 n. 25 (1985).

Virginia argues that, notwithstanding that the District Court did not consider or rule on the merits of Virginia's claims, and had no record on which to do so, this Court may consider the merits of those claims if it concludes that they are ripe for adjudication at this time. In support of that contention Virginia cites one brief footnote from one decision of this Court, *Nixon v. Fitzgerald,* 457 U.S. 731, 743 n. 23 (1982), and a single sentence from a further opinion of this Court, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), that simply relies on the footnote in the *Nixon* opinion without discussion or explanation.

The *Nixon* and *Mitchell* cases do not support Virginia's contention that it would be appropriate for this Court to consider the merits of Virginia's claims even though they were not addressed by the District Court and come with no record by which to assess them. The matters on which this Court ruled in the *Nixon* and *Mitchell* cases bear no relation to those on which Virginia asks the Court to rule in this case. Unlike this case, the matter on which this Court ruled in its *Nixon* and *Mitchell* decisions did not involve the merits of the plaintiffs' claims but only the threshold issue whether the defendants, top-level federal officials, were immune from suit for civil damages based on actions performed in the course of their official duties. In its opinion in *Mitchell* this Court made clear that the matter of immunity of a public official from suit is "conceptually distinct from the merits of the plaintiff's claim that his rights have been violated," 472 U.S. at 527-28, and that such an immunity from suit is not a "mere defense to liability" but is an entitlement not to stand trial or face the other burdens of litigation if the official meets the legal

criteria for such immunity. As such, it is akin to a threshold objection to personal jurisdiction. *See Nixon v. Fitzgerald, supra,* at 753-54.

In its opinions in the *Nixon* and *Mitchell* cases this Court indicated that the premature consideration by it of the merits of a plaintiff's claim is quite different from early stage consideration by it of a government official's claim of immunity from suit on a plaintiff's claims. The Court noted that if the latter is not fully considered and finally resolved at an early stage, the case may erroneously be permitted to go to trial and the right to immunity effectively lost. There is no such consequence of permitting the lower courts to fully consider the merits of a plaintiff's claims before this Court intervenes, particularly where, as here, there is as yet no record whatsoever and no consideration by the District Court of the legal or factual issues raised by Virginia's complaint.

In the District Court Virginia moved for summary judgment on all its claims. The United States and the Intervenors opposed that motion, the United States citing a number of disputed issues of material fact that are involved in Virginia's claims. Among such issues, for example, is the issue whether Chapter 884 was enacted by the Virginia Legislature with the intent of "denying or abridging the right to vote on account of race or color," as prohibited by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. This Court has unsurprisingly held, in another voting rights case involving redistricting by a state legislature, that "the legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). Until this Court has a factual record on which to assess that and other such factual issues, and findings and rulings by the District Court on such factual issues, as well as the legal issues, this Court is in no position to adequately or properly assess Virginia's statutory arguments and should defer any consideration thereof. Until this Court is able to resolve the statutory

issues raised by Virginia, this Court's "deeply rooted" doctrine that it ought not to pass on questions of constitutionality "unless such adjudication is unavoidable", *e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 526 U.S. 314, ___, 119 S.Ct. 765, 779 (1999); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154 (1944), mandates that it also defer any consideration of Virginia's constitutional claims.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal or affirm the judgment of the District Court.

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